* **HIGH COURT OF DELHI AT NEW DELHI**

\+ RFA No.51/2005

Smt.Vimla Devi ..... Appellant
Through none

versus

Smt. Uma Devi (deceased)
through LRs & Ors. .....Respondents
Through Mr.Arun Mohan, Sr. Advocate with
Mr.Arvind Bhat, Advocate for
respondent No.1a and 1b.
Mr.Balraj K. Gupta, Adv. For R-4.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE DR. JUSTICE S.MURALIDHAR

1. Whether reporters of the local papers be allowed to see the judgment ? no
2. To be referred to the Reporter or not ? no
3. Whether the judgment should be reported in the Digest ? no

O R D E R

26.05.2008

1. The present appeal has been preferred against the judgment and order dated 16.9.2004 passed by the learned Additional District Judge, Delhi by which it was held that the suit property cannot be partitioned by metes and bounds and hence instead of its division by partition, the property should be sold and the sale proceeds be divided amongst the 5 co-owners, i.e., the plaintiff and the defendant Nos.1 (the appellant herein), 2,3 and 5.

2. The suit was filed by the plaintiff (respondent No.1) for partition of the property bearing No.795-809, Joshi Road, Karol Bagh, New Delhi measuring 2081 sq. meters (2489 sq. yds.) bearing Khasra No.202/31. The suit was filed initially against seven defendants alleging that the plaintiff and defendant Nos.1 to 3 have 20% share each and defendant Nos.4 to 6 have share of 20% but subsequently learned counsel for the plaintiff filed a statement giving up claim against defendant Nos.4 to 6 and for deleting their names and thereafter the case continued against defendant Nos.1 to 3 and 5 and 7. The plaintiff has alleged that though defendant No.7 is claiming tenancy in the property, it has no right or interest in the property of any kind. The plaintiff has prayed for partition of the suit property and has claimed 1/5th share in the suit property though there was dispute as to whether defendant No.7 was a tenant in the portion of the suit property. In the written statement, defendant No.1 has clearly admitted that she has 1/5th share in the property, but she contended that the tenants cannot be disturbed by partitioning the property as suit for possession has not been filed by the plaintiff.

3. We may mention that a preliminary decree was passed way back on 28.4.1980 holding that plaintiff and defendant Nos.1, 2 3

and 5 have 1/5th share each in the suit property. As regards the issue of tenancy of defendant No.7, after recording of evidence, the learned single Judge of this Court decided the issue by judgment dated 24.7.1998 holding that defendant No.7 has failed to prove his tenancy and claim of defendant No.7 to tenancy in the suit property was rejected. The plaintiff was given liberty to apply for passing of the final decree and was held to be entitled to pendente lite mesne profits and interest against the defendant No.7. The appeal against the order of the learned single Judge was dismissed by the Division Bench of this Court in FAO(OS) 238/1998 vide judgment dated 10.1.2003 against which belated SLP being SLP No.12199/2004 filed in the Supreme Court also came to be dismissed on 3.9.2004.

4. It is seen from the records that the Local Commissioner Ms.Abha Kulshreshtha was appointed in this case vide order dated 5.12.2003, who filed her report on 15.7.2004. The Local Commissioner was directed to ascertain whether the suit property was partible by metes and bounds and to suggest mode of partition. She was also asked to explore the possibility of compromise between the parties with regard to mode of partition of the suit property. The Local Commissioner issued notices to the parties and though the plaintiff, defendant Nos.2,3 and 5 were present or were

represented before the Local Commissioner the defendant No.1, according to the report of the Local Commissioner, was not present and notice issued to her was received back with the endorsement "refused to accept".

5. The Local Commissioner has reported that she had a long discussion with the parties present at the time of inspection in regard to the possibility of compromise and they stated that the suit property cannot be partitioned in any manner whatsoever and the only way out is to sell the same along with the shops as rented on as is where is basis. The Local Commissioner has reported as under:

> "5. That I took 2-3 rounds of the suit properties and observed that the main entrance to the suit property No.802 through which side entrance is also there for suit properties 801 and 803, is very narrow in width being 10 ft. 3 inches only. The suit property 802 is so scattered by way of construction of various small rooms that it is very difficult to partition the same. Still I had long discussions with the parties present in regard to possibility of a compromise and all the parties stated that the suit property 802 cannot be partitioned in any manner whatsoever and the only way out is to sell the suit property 802 alongwith 801 and 803 and the shops as rented on as and where basis. The parties gave a letter dated 10.07.2004 to me which is annexed with this report in original. Vide the said letter the parties have mentioned that the property can not be partitioned by metes and bounds on

various grounds.

> The suit property No.802 is in a very bad shape and the parties told me that this property is lying uncared for the last 25 years. The ceilings of the rooms are dangerous, walls are weak, the property is having a shabby look, heavy junk machinery lying in a shed and few rooms when opened had fouling smell.
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> 6. That vide orders of the Hon'ble Court dated 13.02.2004 all the parties had to pay me Rs.5,000/- each as tentative fee for execution of Local Commission. All the parties excepting defendant No.1, namely, Smt. Vimla Devi had paid me Rs.5,000/- each. Vide my application dated 10.03.2004, I had informed the Hon'ble Court in this regard. Till date, Smt.Vimla Devi has not paid me Rs.5,000/- as directed by the Hon'ble Court."

6. The trial Court has recorded a categorical finding that the suit property cannot be partitioned by metes and bounds and instead of its division by partition, the property should be sold and the sale proceeds should be divided amongst the five co-owners, i.e., the plaintiff and defendant Nos.1,2,3 & 5 equally.

7. Learned counsel for the appellant contended that the trial Court erred in passing the final order without allowing the appellant to file objection to the report of the Local Commissioner and there was no consent of the appellant to sell the property. Learned counsel submitted that there are other modes to partition the suit property in five equal shares to the co-owners of the suit property,

but however, no opportunity was accorded to the appellant and, therefore, the impugned judgment and order should be set aside.

8. The submission of the learned counsel for the appellant is devoid of any merit. In the instant case, the Local Commissioner was appointed on the request of the counsel for the appellant but neither fee of the Local Commissioner was paid by the appellant nor any body was present at the suit property on behalf of the appellant at the time appointed for inspection by the Local Commissioner. In fact the appellant refused to accept notice of the Commissioner. It is seen from the records that it is mainly defendant Nos.1 and 7, who have prolonged the litigation despite the fact that the right of 1/5th share of plaintiff, defendant Nos.1,2,3 and 5 in the suit property is not disputed and in spite of the fact that the preliminary decree was passed by the Court on 28.4.1980 against which no appeal is filed by any of the parties. It is seen from the records that defendant No.1 is in possession of 64% of the suit property as compared to her share of 20% and has been thwarting the actual sale and distribution of proceeds to the others on one pretext or the other. The Local Commissioner in her report dated 15.7.2004 has opined that the property is not partible by metes and bounds because the main entrance to the property being No.802 through

which side entrance is also available to the properties No.801 and 803, is very narrow in width being 10 ft. 3 inches only. Moreover, the suit property is so scattered by construction of various small rooms that it is very difficult to partition the same. The defendant No.7 is the company owned by the appellant's family, which claimed to be a tenant at Rs.100 per month of the bulk of the property, which claim had to be adjudicated as a result of which, the actual receipt by 80% co-owners of their share was delayed by 24 years till the defendant No.7's SLP was finally dismissed on 3.9.2004.

9. In our opinion, the appeal is devoid of any merit and is hereby dismissed.

Chief Justice

S. Muralidhar, J

May 26, 2008
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